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IN THE COURT OF APPEALS OF INDIANA

DAVID A. WITTENSTEIN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0605-CV-400
	)	
THE INDIANAPOLIS MOTOR SPEEDWAY, LLC[1]	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas Carroll, Judge
Cause No. 49D06-0410-CC-1906

January 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] Indy Choppers, Inc., was a defendant below, but is not a party to this appeal.

ROBB, Judge

Case Summary

David Wittenstein appeals the trial court's grant of the Indianapolis Motor Speedway, LLC's ("IMS") motion for summary judgment on Wittenstein's claim, which asserted that IMS was liable for damages arising from a contract between Wittenstein and Indy Choppers, Inc. Concluding that no issue of material fact exists on any of Wittenstein's theories of IMS's liability on the contract, and that therefore the trial court properly granted summary judgment, we affirm.

Issues

Wittenstein raises several issues, which we restate as follows:

(1) Whether the undisputed facts could support an allegation of agency between IMS and Indy Choppers;

(2) Whether the undisputed facts could support an allegation that IMS and Indy Choppers had formed a partnership;

(3) Whether the undisputed facts could support a theory of recovery based on alleged negligent licensing;

(4) Whether the undisputed facts could support a cause of action under the Deceptive Consumer Sales Act; and

(5) Whether the undisputed facts could support a finding that IMS is liable to Wittenstein in equity.

Facts and Procedural History

The facts most favorable to Wittenstein, the non-movant, are as follows. Indy Choppers was a motorcycle shop that built customized motorcycles. Indy Choppers and IMS entered into a licensing agreement, under which Indy Choppers was granted the non-exclusive rights to trademarks owned by IMS for use in a limited-production line of

motorcycles. As part of this agreement, Indy Choppers gave the prototype of the motorcycle to IMS for display in its museum, and motorcycle number 1/100 to IMS to award the winner of the 2004 Indianapolis 500. The motorcycle was displayed on the grounds of the IMS in May 2004. Indy Choppers planned on selling the remainder of the motorcycles to the public, and created various advertisements, including a poster that identified the motorcycle as "the exclusive bike of the Indianapolis Motor Speedway." Appellant's Appendix at 148.

Wittenstein had a business relationship with Indy Choppers through his work as a salesman for a chemical manufacturing company. While at Indy Choppers' shop during the course of this relationship, Wittenstein observed the prototype in its production stages. Employees of Indy Choppers told Wittenstein that they were "building bikes for the Indianapolis Motor Speedway." Id. at 134. Wittenstein expressed interest in purchasing one of the motorcycles, and on April 14, 2004, Indy Choppers sent Wittenstein a proposal, which identified the motorcycle Wittenstein would purchase as "Indy Choppers / Indy 500 Collector Bike #2." Id. at 151. Wittenstein gave Indy Choppers $65,000 as a deposit on the $75,000 total price of the motorcycle. Indy Choppers never delivered the motorcycle to Wittenstein and did not refund his deposit. Indy Choppers has since gone out of business, and its principals have filed for relief under the bankruptcy code.

Wittenstein filed suit against Indy Choppers for breach of contract, and also named IMS based on several theories of liability. Wittenstein was unable to obtain any remedy from Indy Choppers because of the protections afforded by the bankruptcy code. The evidence against IMS included the depositions of Wittenstein and Terry Angstadt, IMS's Vice President of Marketing, the poster, the licensing contract between IMS and Indy Choppers,

and the sales proposal and invoice. IMS moved for summary judgment, and the trial court granted the motion without entering findings of fact or conclusions of law. Wittenstein now appeals. Additional facts will be included as necessary.

Discussion and Decision[2]

Summary judgment is appropriate when the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The trial court's grant of a motion for summary judgment comes to us cloaked with a presumption of validity. Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005). However, we review a trial court's grant of summary judgment de novo, construing all facts and making all reasonable inferences from the facts in favor of the non-moving party. Progressive Ins. Co. v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006), trans. denied. We may affirm the trial court's grant of summary judgment upon any basis that the record supports. Rodriguez, 824 N.E.2d at 446.

I. Agency Relationship Between IMS and Indy Choppers

The authorization created through an agency relationship "results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, and consent by the other so to act." Mullen v. Cogdell, 643 N.E.2d 390, 398 (Ind. Ct. App. 1994), trans. denied. An agent's act will bind the principal only if the agent had

[2] Wittenstein filed a Motion to Disregard and Expunge on August 29, 2006, requesting that we disregard and expunge sentences two through five of the second paragraph of IMS's Conclusion section of its brief, as the factual assertions made therein are not supported by citations to the record. Although we decline Wittenstein's invitation to strike this portion of IMS's brief, we remind IMS that any statement of fact in its brief must be supported by a citation. Ind. Rule App. P. 22(C). We note that the statements Wittenstein asks us to strike play no part in our decision and were not considered in our analysis.

authority to bind him. Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc., 773 N.E.2d 881, 888 (Ind. Ct. App. 2002), trans. dismissed. Generally, the question of whether an agency relationship exists is a question of fact. Douglas v. Monroe, 743 N.E.2d 1181, 1187 (Ind. Ct. App. 2001). However, if the evidence regarding the agency relationship is undisputed, the existence of the relationship is a question of law for which summary judgment can be appropriate. Id. Wittenstein argues that issues of material fact exist as to whether any of three types of agency existed between IMS and Indy Choppers: (1) agency based upon actual authority; (2) agency based upon apparent authority; and (3) agency by estoppel. We will address each in turn.

A. Actual Authority

A principal gives an agent actual authority through "written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Scott v. Randle, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998), trans. denied. This relationship may be created by implication and may be demonstrated by circumstantial evidence. Heritage Dev. of Ind., Inc., 773 N.E.2d at 889.

Wittenstein argues that an actual agency relationship can be inferred because the poster designed by Indy Choppers and approved by IMS does not indicate that the motorcycle was merely licensed by IMS. Wittenstein argues that IMS would not have approved this poster unless Indy Choppers actually was the agent of IMS. Appellant's Br. at 15. However, the essential element of an actual agency relationship is the agent's reasonable belief that it has the authority to bind the principal. Scott, 697 N.E.2d at 66 ("The focus of

actual authority is the belief of the agent."). Here, the undisputed evidence shows that IMS entered into an agreement with Indy Choppers that clearly indicates Indy Choppers is merely a licensee. We hold, as a matter of law, that IMS's approval of this poster could not give Indy Choppers the reasonable belief that it had been elevated to agent status. Therefore, no issue of material fact exists as to whether Indy Choppers had actual authority to bind IMS to the sales contract.

B. Apparent Authority

Apparent authority "refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations of the agent." Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 675 (Ind. 2001). For such authority to exist, "[i]t is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party." Pepkowski v. Life of Ind. Ins. Co., 535 N.E.2d 1164, 1167 (Ind. 1989) (emphasis added). The alleged agent's statements are not sufficient to give rise to apparent authority. Id.

Even though Wittenstein admits that he had no direct contact with IMS regarding the motorcycle, he argues that IMS's act of approving the poster constitutes the necessary manifestation. We acknowledge that the placement of public advertisements can give rise to a third party's reasonable belief that an agency relationship exists when the advertisements state that one party is acting as the agent of another party or has the authority to bind that party. Sword v. NKC Hospitals, Inc., 714 N.E.2d 142, 148 (Ind. 1999) (citing RESTATEMENT (SECOND) OF AGENCY § 8 cmt. b). However, we disagree that the

advertisement in this case creates such a reasonable belief.

In Drake v. Maid-Rite Co., 681 N.E.2d 734, 738-39 (Ind. Ct. App. 1997), we held, as a matter of law, that the alleged principal's authorization of the use of its letterhead and logo was not sufficient to give a third party the reasonable belief that an agency relationship existed. As the Florida supreme court has noted, in today's business world, one company's use of another company's logos, symbols, and products cannot substantiate the assumption that the companies are in an agency relationship. Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 121 (Fla. 1995); see also McLaughlin Transp. Sys., Inc. v. Rubenstein, 390 F. Supp. 2d 50, 63 (D. Mass. 2005) (holding that no issue of material fact existed as to existence of apparent authority based on display of company's logo in another company's advertisements and paperwork). Similarly, we hold that this poster, as a matter of law, could not have given Wittenstein the reasonable belief that Indy Choppers was acting as an agent of IMS when he entered into the contract to purchase the motorcycle. The poster contains no indication that Indy Choppers is acting on behalf of IMS or has the authority to bind IMS to any contract. Although Wittenstein is correct that the poster does not indicate that Indy Choppers is a corporation, the placement of the companies' logos clearly indicates that IMS and Indy Choppers are separate entities. The poster also directs viewers to Indy Choppers' website, "www.indychoppers.com," further distinguishing Indy Choppers from IMS. The mere statement, "Introducing the exclusive bike of the Indianapolis Motor Speedway"[3] creates no

[3] Wittenstein makes much of the fact that there is no trademark symbol following this phrase, and states that "[t]he poster doesn't indicate that any of the 'marks' were registered." Appellant's Br. at 13. However, IMS's logo, which appears below "Indy Choppers" near the top of the poster, contains the "®" symbol.

reasonable belief that Indy Choppers was acting as the agent of IMS. We conclude that no issue of material fact exists as to whether Indy Choppers had the apparent authority to bind IMS to a sales contract.

C. Agency By Estoppel

The elements of agency by estoppel are: (1) a party has made false representations or concealed material facts with either actual or constructive knowledge of the true state of facts; (2) the party made the statements intending to induce another party's reliance; and (3) the other party must have changed positions in reliance upon the false representations. Hope Lutheran Church v. Chellew, 460 N.E.2d 1244, 1251 (Ind. Ct. App. 1984). The elements of agency by estoppel are substantially the same as those for apparent authority. Sword, 714 N.E.2d at 148. "The distinction, if any, is that agency by estoppel requires both reliance and a change in position." Id. For substantially the same reasons we hold the poster creates no reasonable belief that Indy Choppers is the agent of IMS with the authority to bind IMS to a sales contract, we hold as a matter of law that IMS did not approve the poster with the intent to induce Wittenstein's reliance.[4] Because the poster creates no reasonable belief that Indy Choppers is the agent of IMS, IMS could not be found to have approved the poster with intent to instill that belief. We hold that no issue of material fact exists as to whether Wittenstein could prevail on a theory of agency by estoppel.

The undisputed facts indicate, as a matter of law, that Indy Choppers did not act as IMS's agent when it entered into the sales contract with Wittenstein. The trial court properly

[4] Because we conclude that summary judgment is appropriate on this element, we need not

granted IMS's motion for summary judgment on Wittenstein's theory of liability based on agency.

II. Partnership

Wittenstein next argues summary judgment is not appropriate because an issue of material fact exists as to whether IMS and Indy Choppers had formed a partnership. We disagree.

A partnership is "an association of two (2) or more persons to carry on as co-owners a business for profit." Ind. Code § 23-4-1-6(1). Therefore, in order for a partnership to exist "the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community interest in the profits." Byrd v. E.B.B Farms, 796 N.E.2d 747, 754 (Ind. Ct. App. 2003), trans. denied. The two necessary elements of a partnership are: "(1) a voluntary contract of association for the purpose of sharing profits and losses which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a partnership." Id. The existence of a partnership is generally a question of fact. Id. However, as in this case, when the undisputed evidence establishes that no partnership relationship exists, summary judgment is appropriate. Cf. Douglas, 743 N.E.2d at 1187 (summary judgment is appropriate in determination of agency relationship when facts are undisputed); Carter v. Prop. Owners Ins. Co., 846 N.E.2d 712, 717 (Ind. Ct. App. 2006), trans. dismissed (question of whether one is an employee or independent contractor is usually a question of fact, but when facts are undisputed, court may make determination as a matter of law).

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discuss whether the evidence gives rise to an issue of material fact with regards to the other elements.

Here, the evidence in no way supports a finding that a partnership existed between Indy Choppers and IMS. The contract between Indy Choppers and IMS indicates neither that the two parties would be carrying on a business together nor that they will share in any profits. To the extent that Wittenstein argues that Indy Choppers' use of IMS's logo gives rise to the reasonable belief that the two companies had formed a partnership, we reject the argument for the same reasons that we find that Indy Choppers did not have the apparent authority to bind IMS to a sales contract.

We hold that no issue of material fact exists as to whether IMS and Indy Choppers had formed a partnership. The trial court properly granted IMS's motion for summary judgment on Wittenstein's theory of liability based on partnership.

III. Negligence

Wittenstein argues that IMS is liable under a theory of negligence, arguing that IMS breached its duty to Wittenstein because when it issued a license to Indy Choppers, IMS "fail[ed] to conform its investigation of Indy Choppers to its own processes and procedures." Appellant's Br. at 18.

In order to recover damages based on a theory of negligence, the plaintiff must establish three elements: "(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to the standard of care, and (3) an injury to the plaintiff proximately caused by the breach." Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003). Although summary judgment is normally inappropriate on a claim of negligence, summary judgment is appropriate if the undisputed facts indicate that the defendant's actions were not the

proximate cause of the plaintiff's injury.[5] Mayfield v. Levy Co., 833 N.E.2d 501, 505 (Ind. Ct. App. 2005). An act is the proximate cause of an injury if "the injury was a natural and probable consequence of the act in issue, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated." Lane v. St. Joseph's Reg'l Med. Ctr., 817 N.E.2d 266, 273 (Ind. Ct. App. 2004), disagreed with on other grounds by, Winchell v. Guy, 857 N.E.2d 1024, 1028-29 (Ind. Ct. App. 2006).

We hold as a matter of law that neither IMS's grant of the license, nor approval of the poster, nor any of IMS's interactions with Indy Choppers was the proximate cause of Wittenstein's injury. The failure of Indy Choppers to either deliver the motorcycle or refund Wittensteins' money was not the natural and probable consequence of any action taken by IMS. As discussed above, Wittenstein could not have reasonably relied upon any manifestation of IMS in entering into a contract with Indy Choppers. Any unreasonable reliance on the poster by Wittenstein could not be reasonably foreseen or anticipated by IMS. IMS also could not have reasonably anticipated that Indy Choppers would collect Wittenstein's deposit of $65,000, and then neither return the deposit nor deliver the motorcycle.

We hold that no issue of material fact exists as to whether IMS proximately caused injury to Wittenstein. The trial court properly granted IMS's motion for summary judgment on Wittenstein's theory of liability based on negligence.

IV. The Deceptive Consumer Sales Act

[5] Because we conclude that IMS's actions were not the proximate cause of Wittenstein's injury, we need not consider whether IMS, as a licensor, had any duty to Wittenstein or whether IMS breached

Wittenstein next argues that an issue of material fact exists as to IMS's liability under the Deceptive Consumer Sales Act ("DCSA").[6] Wittenstein claims that he qualifies as "[a] person relying upon an uncured or incurable deceptive act," and therefore "may bring an action for the damages actually suffered as a consumer as a result of the deceptive act." Ind. Code § 24-5-0.5-4. It is considered a deceptive act to represent "[t]hat such subject of a consumer transaction has sponsorship [or] approval . . . it does not have which the supplier knows or should reasonably know it does not have." Ind. Code § 24-5-0.5-3(a)(1). It is also a deceptive act to represent "[t]hat the supplier has a sponsorship, approval, or affiliation in such consumer transaction he does not have, and which the supplier knows or should reasonably know that he does not have." Ind. Code § 24-5-0.5-3(a)(7).

Wittenstein argues that by approving the poster, IMS engaged in "a scheme with the intent to mislead the consuming public as to the relationship between Indy Choppers and IMS." Appellant's Br. at 21. IMS argues that it is not a "supplier" for purposes of the DCSA. We need not decide this point because even if we assume, arguendo, that IMS is a "supplier" for purposes of the DCSA, we conclude that the undisputed facts indicate that Wittenstein has no cause of action under the act. As discussed above, as a matter of law it is not reasonable for a consumer viewing the poster to believe that IMS and Indy Choppers were a partnership or in an agency relationship under which IMS would be a party to a contract for the purchase of the motorcycle. The poster did not convey the message that IMS sponsored the motorcycle or that Indy Choppers and IMS were affiliated in a way that they

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any duty that might have existed.

[6] Ind. Code §§ 24-5-0.5-1 et seq.

were not, and therefore the poster was not deceptive.

We hold that no issue of material fact exists as to IMS's liability under the DCSA. The trial court properly granted IMS's motion for summary judgment on Wittenstein's theory of liability based on the DCSA.

V. Estoppel

Wittenstein finally argues that material issues of fact preclude summary judgment on the issue of whether IMS is liable to Wittenstein in equity. It is not entirely clear upon what theory Wittenstein argues IMS should be liable, or what exactly IMS should be "estopped" from doing. However, at various points in his brief, Wittenstein mentions equitable estoppel (also referred to as estoppel in pais) and promissory estoppel. Although the elements of the theories are slightly different, all theories of estoppel "are based on the same underlying principle: one who by deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other." Brown v. Branch, 758 N.E.2d 48, 52 (Ind. 2001).

A. Equitable Estoppel

In order to succeed on a claim of equitable estoppel, Wittenstein must demonstrate: "'(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change its position prejudicially.'" Hepburn v. Tri-County Bank, 842 N.E.2d 378, 386 (Ind. Ct. App. 2006), trans. denied (quoting City of Crown Point v. Lake County, 510 N.E.2d 684, 687 (Ind. 1987)).

For the same reasons that no issue of material fact exists as to Indy Choppers'

apparent authority to bind IMS, we hold that no issue of material fact exists as to whether Wittenstein relied upon IMS's conduct when entering into the sales contract and changed his position prejudicially.

B. Promissory Estoppel

The elements of promissory estoppel are: "(1) a promise by the promissor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise." Brown, 758 N.E.2d at 52.

In this case, there is no evidence that IMS made any promise to Wittenstein, as Wittenstein stated that he had no contact with IMS prior to entering into the contract with Indy Choppers. Even if the poster is viewed as a communication between IMS and Wittenstein, and some sort of promise is said to arise from this poster, as discussed above, any reliance by Wittenstein upon this poster was not reasonable. Therefore Wittenstein, as a matter of law, cannot meet the third element of promissory estoppel, and no issue of material fact precludes the trial court's grant of summary judgment.

Conclusion

We hold that the undisputed evidence establishes that no agency or partnership relationship existed between IMS and Indy Choppers, IMS did not proximately cause Wittenstein's injury and cannot be held liable under a theory of negligence or the DCSA, and Wittenstein cannot prevail under equitable theories. Therefore, no issue of material fact exists and the trial court properly granted IMS's motion for summary judgment.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs with opinion.

IN THE
COURT OF APPEALS OF INDIANA

DAVID A. WITTENSTEIN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0605-CV-400
	)	
THE INDIANAPOLIS MOTOR SPEEDWAY, LLC,	)	
	)	
	)	
Appellee-Defendant.	)	

SULLIVAN, Judge, concurring

I concur but write separately to voice my disagreement with Part IV of the majority opinion.

The Deceptive Consumer Sales Act does not contemplate that parties such as IMS in the case before us are "suppliers" under the Act. IMS does not "regularly engage[] in or solicit[] consumer transactions" with respect to motorcycles. Neither is IMS a manufacturer, wholesaler, or retailer" of such products. Accordingly, I do not believe that IMS is a "supplier" within the intendment of Indiana Code § 24-5-0.5-2 (a)(3)(A) (Burns Code Ed. Repl. 2006). See McCormick Piano & Organ Co., Inc. v. Geiger, 412 N.E.2d 842, 848 (Ind. Ct. App. 1980).

In the case before us, IMS approved the poster which represented that the motorcycle was "the exclusive bike of the Indianapolis Motor Speedway." In doing so, one might

reasonably conclude that IMS was sponsoring the motorcycle.

Be that as it may, the majority's implied conclusion that by approving such poster, IMS was participating in a fraudulent scheme so as to make it a "supplier" is incorrect.

I am aware of Schmidt Enterprises, Inc. v. State, 170 Ind.App. 628, 639, 354 N.E.2d 247, 253 (1976) which states that:

> "All who knowingly enter a fraudulent scheme become liable for the harm caused by the scheme—even if their part of the scheme does not entail making fraudulent representations."

It is indeed important to note that the quoted proposition depends upon the existence of a "scheme." In the case before us such a scheme would have to exist as between Indy Choppers and IMS. One does not enter a fraudulent scheme unless there is a scheme in place. To be sure, two entities may enter into a fraudulent scheme together and even if one of the entities makes no fraudulent representation, that entity is liable for the fraudulent representations made by the other participant in the scheme. But in such instance there must be two participants in the scheme. One does not scheme with oneself.

A participant in a fraudulent scheme may be liable for fraudulent representations made by the supplier, a co-participant in the scheme. But such liability is based upon complicity in the fraudulent scheme with the supplier, not upon the fact that both participants in the scheme are suppliers.

Furthermore, even if one were to determine that the acts of IMS constituted a representation of sponsorship of the motorcycle, no person contracting with Indy Choppers for purchase of the particular motorcycle could reasonably conclude that IMS was responsible for Indy Chopper's failure to deliver the cycle. The record reflects no facts or

any reasonable inference to be drawn from the facts that Wittenstein believed that he was purchasing the vehicle from IMS or that IMS was guaranteeing delivery by Indy Choppers.

Subject to the above stated disagreement as to Part IV of the majority opinion, I concur in the affirmance of the summary judgment in favor of IMS.